

Who Does Form I-9 Govern?

Under the Immigration Reform and Control Act of 1986 (IRCA), the regulation of illegal immigration was a focal point as it related to employment. Employment was being used in this context to encourage unauthorized persons to come to the United States, because the hiring and continued employment of aliens known to be unauthorized workers by employers was prohibited. In order to be compliant with the law, the verification of employment eligibility was mandated for all U.S. employers after November 6, 1986. This verification was accomplished through the completion of Employment Eligibility Verification forms, namely Form I-9. These forms not only applied to foreign persons seeking employment, but also to U.S. citizen employees. It is the employer's responsibility to verify both the employment eligibility and identity of the prospective employee. Consequently, employers who do not comply with the Form I-9 requirement may be subject to not only civil sanctions, but also criminal penalties.

The Risk of Civil and Criminal Sanctions

As recently as October, 2010, the Secretary of U.S. Homeland Security, Janet Napolitano, articulated that under the Obama administration audits of more than 3, 200 employers were conducted by the Immigration and Customs Enforcement (ICE). These audits resulted in the imposition of approximately \$50 million in fines for non-compliance with mandated worksite conditions. According to Napolitano, the collective audits and fines during this period extended beyond those conducted and imposed under the Bush administration.

This in turn has forecasted an augmentation in audits by ICE, which will extend to not only local corporations, but also national and multinational corporations. To preclude the risk of civil and criminal penalties, the completion of Form I-9 for persons employed by these corporations is mandatory. While under the Bush administration immigration raids were more prevalent, the Obama administration through the use of ICE will use audits as an alternative to the raids employed in the past.

For each incomplete or erroneous I-9 Form, the penalties may range from \$110 to \$1,100 and this extends to clerical errors, including for instance a missing date or signature by the employer or employee. The improper maintenance and storage of I-9 Forms may result in imposed fines anywhere between \$110 and \$3,000 per violation. Once it has been determined that an employee is an unauthorized worker, the continuation of hiring or employing unauthorized employees may result in a fines ranging from \$250 to \$11,000. In addition to these fines, prison terms may also be imposed. ICE announced that 2010 was a record-breaking year for its issuance of fines to companies of all sizes.

What May be Reviewed Pursuant to an I-9 Audit?

Attendant with I-9 Form audits is the review of not only the existence or lack thereof of Form I-9, but also the organization's payroll records, W-2 reports and supplementary documentation. Supplementary documentation may extend to fraudulent papers used to

fictionally prove authorized employment and the identity of the unauthorized employee. ICE need only provide the organization with its intention to audit by three day notice prior to reviewing its files.

When Should Form I-9 be completed?

The First Section of Form I-9 must be completed by a prospective employee prior to his or her first day at work. This is followed by the Second Section, which involves the employer's verification of an original document offered by the prospective employee, which has not yet expired. Documentation under this category that establishes both identity and employment eligibility may extend to the following:

1. An unexpired OR expired U.S. Passport;
2. A Permanent Resident Card (Form I-551);
3. An unexpired foreign passport with a temporary I-551 stamp;
4. For non-immigrant aliens authorized to work for a specific employer, an unexpired foreign passport with an unexpired Arrival/Departure Record (Form I-94); and
5. An unexpired Employment Authorization Document with a photograph (Form I-766, I-688, I-688A or I-688B).

Documentation that may establish identity alone may include, but is not limited to:

1. A State Driver's license or ID card (this may also be issued by an outlying territory of the U.S.) containing a photograph or information extending to the person's name, date of birth, sex, height, eye color and address;
2. A school ID card with a photograph;
3. A voter's registration card;
4. A U.S. Military card or draft record; or
5. A day-care or nursery school record.

Documentation that may establish employment eligibility alone may include, but is not limited to:

1. A U.S. social security card issued by the Social Security Administration, that does not state it is invalid for employment;
2. A Certificate indicating birth abroad issued by the Department of State (Form FS-545 or Form DS-1350);

3. A U.S. Citizen ID Card (INS Form I-197); or

4. An ID Card used by Resident Citizens in the United States (INS Form I-179).

It is advisable that employers attach any documentation supplied by prospective employees, irrespective of it not being required by the Immigration Reform and Control Act.

When an authorized employee is approaching the expiration of valid employment, Section Three of the I-9 Form must be completed to effect re-verification of an eligible employment status. This must be done before the Form I-9 for the period under which employment was authorized expired, so that authorized employment may be validly extended. A record of Form I-9 must be maintained for three years or in the event that the employee and employer sever ties, one year, whichever period may be longer.

What if I Later Realize that I have Failed to Complete a Form I-9 and would like to do so?

Employers that have failed to comply with Form I-9 requirements for persons currently employed with them should complete a Form I-9 at the time that the deficiency is discovered. It must be dated on the date that it was signed. The date should not reflect dates prior to the employee's start date. Such an error may result in greater exposure to liability and the ultimate imposition of greater sanctions if detected by ICE because of fraudulent information.

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